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# The Wisconsin Consumer Act: Territorial Considerations

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# THE WISCONSIN CONSUMER ACT: TERRITORIAL CONSIDERATIONS

RALPH C. ANZIVINO\*

*This Article primarily analyzes the impact of the territorial specifications of the Wisconsin Consumer Act on a consumer transaction. The Wisconsin Consumer Act specifies six territorial circumstances, and this Article analyzes each separately. The six territorial circumstances are as follows: (1) Was the transaction “made in Wisconsin”?; (2) Is there collection activity in Wisconsin?; (3) Is there collection activity in a foreign jurisdiction?; (4) Did the transaction involve an open-end credit sale?; (5) Did the parties’ contract contain a Wisconsin or foreign choice-of-law clause?; and (6) How do the WCA venue rules apply? Depending on which of the territorial circumstances applies, all or some parts of the WCA will apply to the consumer transaction.*

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## I. INTRODUCTION

It is essential for any business or consumer lawyer to have a working understanding of the Wisconsin Consumer Act (WCA).<sup>1</sup> It has been over thirty years since there has been any serious analysis of the Act. Since that time, numerous amendments and hundreds of court decisions have changed and interpreted the statute. The WCA is very intricate, and a failure to comply with its mandates has very serious consequences. As a result, debtors' attorneys mine the statute for violations, and creditors' attorneys seek to comply with the statute from the inception of the transaction.

There are two primary inquiries that an attorney must make when defining the scope of the WCA. First, the attorney must determine if the transaction is the type of consumer transaction that the Act intends to regulate. If the consumer transaction is a consumer credit transaction or other specified transaction, the attorney answers the first inquiry in the affirmative.<sup>2</sup> A prior article addressed the elements of a consumer credit transaction,<sup>3</sup> and a subsequent article will address those additional transactions that are also subject to the Act. Second, the attorney must recognize the territorial considerations mandated by the Act. The territorial considerations relate to several variables: whether the consumer transaction was made in Wisconsin or out-of-state; whether collection activity is being conducted in Wisconsin or out-of-state; whether the parties' contract contains a Wisconsin or foreign choice-of-law provision, and whether the choice-of-law provision is legally effective in Wisconsin or out-of-state; and finally, whether proper venue exists for a consumer act claim. This article will address all of the

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1. Wisconsin Statutes Chapters 421–27 collectively constitute the Wisconsin Consumer Act. WIS. STAT. § 421.101 (2011–2012). Chapter 421 is entitled “Consumer Transactions—General Provisions and Definitions”; Chapter 422 is entitled “Consumer Credit Transactions”; Chapter 423 is entitled “Consumer Approval Transactions and Other Consumer Rights”; Chapter 424 is entitled “Consumer Transactions—Insurance”; Chapter 425 is entitled “Consumer Transactions—Remedies and Penalties”; Chapter 426 is entitled “Consumer Transactions—Administration”; and Chapter 427 is entitled “Consumer Transactions—Debt Collection.” *Id.* at chs. 421–27.

2. *See* *Dean Medical Ctr, S.C. v. Conners*, 2000 WI App 202, ¶ 6, 238 Wis. 2d 636, 618 N.W.2d 194 (explaining that before the provisions of the Wisconsin Consumer Act can apply, “the obligation incurred must be the result of a consumer credit transaction”); *see also* WIS. STAT. § 421.301(10) (defining, for the purposes of the Wisconsin Consumer Act, what constitutes a “consumer credit transaction”).

3. Ralph C. Anzivino, *The Wisconsin Consumer Act: When Is a Transaction a Consumer Credit Transaction?*, 96 MARQ. L. REV. 205 (2012).

territorial issues that arise under the WCA.

## II. TERRITORIAL CONSIDERATIONS

There are six territorial considerations that arise under the WCA. The first territorial consideration is that all “consumer transactions made in [Wisconsin] and . . . modifications including refinancings, consolidations and deferrals, made in [Wisconsin], of consumer credit transactions wherever made[,]” are subject to the WCA.<sup>4</sup> Thus, the critical determination for the attorney is whether the transaction was made in Wisconsin. The second territorial consideration involves collection activity conducted in Wisconsin for a consumer transaction that was not made in Wisconsin.<sup>5</sup> For WCA purposes, it is essential to determine whether the customer was a Wisconsin resident at the time of contracting. The third territorial consideration deals with collection activity outside of Wisconsin.<sup>6</sup> Notably, there are two circumstances where Wisconsin law will apply to the collection activity in another state.<sup>7</sup> The fourth territorial consideration covers credit card sales to Wisconsin residents.<sup>8</sup> The fifth territorial consideration entails consumer transactions that have a choice-of-law clause.<sup>9</sup> A Wisconsin choice-of-law clause can have extra-territorial effect.<sup>10</sup> And, perhaps more significantly, a foreign choice-of-law clause may have limited to no effect in Wisconsin depending on the facts in the case.<sup>11</sup> Finally, the sixth territorial consideration encompasses issues determining proper venue under the WCA.<sup>12</sup> Improper venue under the WCA has significantly different consequences than improper venue under a non-

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4. WIS. STAT. § 421.201(1)–(2).

5. *Id.* § 421.201(4)–(5).

6. *Id.* § 421.201(5).

7. *See infra* Part II.C.

8. WIS. STAT. § 421.201(3).

9. *Id.* § 421.201(9).

10. *See, e.g., Aldens, Inc. v. Ryan*, 454 F. Supp. 465, 472 (W.D. Okla. 1976) (“In determining whether a State may extend the effects of its laws beyond its borders, the Supreme Court has examined the degree of contacts which the State seeking to regulate has with the person and/or transaction sought to be regulated.” (citing *Watson v. Emp’rs Liab. Assurance Corp.*, 348 U.S. 66 (1954))).

11. *See infra* Part II.E.2 (discussing the three situations where a foreign choice-of-law clause will not apply despite the fact that the contract involves a resident of a state other than Wisconsin); *see also infra* Part II.E.3 (discussing the nullification of a foreign choice-of-law clause under section 421.201(10)(a) of the Wisconsin Statutes).

12. WIS. STAT. § 421.401.

WCA case.<sup>13</sup> This Article analyzes each territorial consideration independently.

*A. Consumer Transactions Made in Wisconsin*

The WCA specifies three territorial circumstances, any one of which will cause a consumer transaction to be made in Wisconsin. The first is when the merchant in Wisconsin receives an “offer of the customer.”<sup>14</sup> The second is when a “writing signed by the customer and evidencing the obligation . . . is received by the merchant in [Wisconsin].”<sup>15</sup> And, the third is when “[t]he merchant induces the customer who is a resident of [Wisconsin] to enter into the transaction” through solicitation by face-to-face, mail, or telephone interaction “directed to the particular customer in [Wisconsin].”<sup>16</sup> It is important to note that residency varies with the legislative enactment.<sup>17</sup> The residence of a customer for WCA purposes is “the address given by the customer . . . in any writing signed by the customer in connection with a consumer transaction.”<sup>18</sup> The customer’s given address remains as the correct address “until the merchant knows or has reason to know of a new or different address.”<sup>19</sup> One’s residence, however, may not be what he or she believes it is. In *Wehrenberg v. Toyota Motor Credit Corp.*,<sup>20</sup> Wehrenberg signed a consumer lease in California, and when litigation ensued, she claimed she was a Wisconsin resident.<sup>21</sup> Wehrenberg argued that her lease was made in Wisconsin “because she considered Wisconsin to be her primary and permanent residence when she signed the lease.”<sup>22</sup> The

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13. Compare *id.* § 801.50(1) (“A defect in venue shall not affect the validity of any order or judgment.”), with *id.* § 421.401(2)(a)–(b) (providing that improper venue, unless the defendant appears and waives it, requires the court to transfer or dismiss the action). See also *infra* text accompanying notes 237–47 (explaining other significant differences between improper venue under the WCA and the general venue statutes).

14. WIS. STAT. § 421.201(2)(a).

15. *Id.*

16. *Id.* § 421.201(2)(b).

17. See, e.g., *id.* § 815.18(2)(r) (“‘Resident’ means an individual who intends to maintain his or her principal dwelling in this state.”).

18. *Id.* § 421.201(8).

19. *Id.*

20. *Wehrenberg v. Toyota Motor Credit Corp.*, No. 2001AP0985, 2002 WL 24417 (Wis. Ct. App. Jan. 10, 2002).

21. *Id.* ¶ 4.

22. *Id.*

court disagreed with her interpretation.<sup>23</sup> Instead, the court reasoned that her “subjective belief that Wisconsin was her permanent residence [did] not transform a lease she signed in California, on which she listed a California address, into a lease [made] in . . . Wisconsin.”<sup>24</sup>

Two of the three territorial circumstances that cause a consumer transaction to be made in Wisconsin require the merchant to have a place of business in Wisconsin.<sup>25</sup> The third territorial circumstance, however, anticipates an out-of-state merchant contracting with a Wisconsin resident.<sup>26</sup> Thus, the third territorial circumstance raises the issue of whether the WCA can constitutionally be applied to an interstate trader who has no place of business in Wisconsin.<sup>27</sup> That issue has been resolved in favor of the State of Wisconsin.<sup>28</sup>

In *Aldens, Inc. v. LaFollette*, Aldens was an Illinois corporation that sold its merchandise by mail order in all fifty states.<sup>29</sup> Aldens’s only physical place of business was in Chicago.<sup>30</sup> Aldens mailed catalogs and flyers to approximately 350,000 Wisconsin residents and had an active customer base of 65,000 Wisconsin residents.<sup>31</sup> Aldens’s sales to Wisconsin residents averaged \$4.6 million per year, and 73% of those sales were from credit sales, with the remaining 27% from cash sales.<sup>32</sup> On credit sales, Aldens retained purchase money security interests but never enforced them.<sup>33</sup> Aldens sent all invoices and some product deliveries through the mail.<sup>34</sup> Additionally, Aldens used the mail to attempt collection on delinquent accounts and also did so by telephone from Chicago.<sup>35</sup> Aldens either wrote off seriously delinquent accounts

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23. See *id.* ¶ 5 (“We reject Wehrenberg’s argument.”).

24. *Id.*

25. WIS. STAT. § 421.201(2)(a) (2011–2012).

26. *Id.* § 421.201(2)(b).

27. See *Aldens, Inc. v. LaFollette*, 552 F.2d 745, 750 (7th Cir. 1977) (“Aldens’s most vigorous constitutional attack questions the very existence of Wisconsin’s power to regulate a purely interstate trader.”).

28. See *id.* at 753 (holding that “the application of the Wisconsin Consumer Act to Aldens,” an out of state corporation with no place of business in Wisconsin, “[was] constitutional”).

29. *Id.* at 747.

30. *Id.*

31. *Id.* at 747–48.

32. See *id.* at 748.

33. *Id.*

34. *Id.*

35. *Id.*

or turned them over to “Illinois or Minnesota independent collection agencies . . . .”<sup>36</sup> Concerning the WCA, Aldens brought a declaratory judgment action asserting that application of the WCA to its operations violated the Due Process Clause and the Commerce Clause.<sup>37</sup> In resolving the issue, the court balanced the interest of Wisconsin in protecting its citizens from unfair business practices against any interference with the natural functioning of interstate markets.<sup>38</sup> The Seventh Circuit concluded that the WCA was not an undue burden on interstate commerce when applied to an interstate merchant who was contracting with Wisconsin residents in Wisconsin.<sup>39</sup>

Finally, it is important to note that an *in rem* proceeding to repossess collateral pursuant to the WCA can be brought in Wisconsin even though the collateral is not in Wisconsin, provided the transaction was made in Wisconsin.<sup>40</sup> In *General Motors Acceptance Corp. v. Schalow*, a consumer leased an automobile from GMAC in Wisconsin.<sup>41</sup> Subsequently, the consumer defaulted on his lease payments, and GMAC brought a replevin action.<sup>42</sup> GMAC was unable to personally serve the consumer and completed service by publication.<sup>43</sup> Thereafter, GMAC repossessed the vehicle.<sup>44</sup> The consumer argued that since replevin is an *in rem* proceeding, the court lacked subject matter jurisdiction without proof that the vehicle was in Wisconsin when the action was commenced.<sup>45</sup> The court disagreed.<sup>46</sup> Instead, the court noted that the WCA does not require that the collateral be located in Wisconsin as a prerequisite to commencing a remedial action.<sup>47</sup> The

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36. *Id.*

37. *Id.* at 746–47.

38. *See id.* at 749–50.

39. *See id.* at 753. It should be noted that the court indicated that if the Wisconsin residents had summer homes in another state, the WCA could not regulate Aldens’s credit terms for those transactions made in another state. *See id.* at 750–51 & n.10.

40. *Gen. Motors Acceptance Corp. v. Schalow*, No. 1987AP2127, 1988 WL 136048, at \*2 (Wis. Ct. App. Oct. 19, 1988).

41. *Id.* at \*1.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (“There are several reasons why Schalow fails to succeed in his argument that unless the property is in the state at the commencement of the action the court lacks subject matter jurisdiction.”).

47. *Id.* at \*2.

only prerequisites to a remedial action under the WCA are that the action stems from a consumer credit transaction<sup>48</sup> and that the transaction was made in Wisconsin.<sup>49</sup> The court indicated that the purpose of the remedial action is to determine the “*right* of possession . . . not possession itself.”<sup>50</sup> Therefore, only once the parties resolve the right to possession does “the situs of the [collateral] become important.”<sup>51</sup>

### *B. Collection Activity in Wisconsin*

If a consumer transaction is not made in Wisconsin, as explained in the preceding section, certain provisions of the WCA may still apply to the transaction when collection activity is conducted in Wisconsin. First, certain defined provisions of the WCA will universally apply to any collection activity conducted in Wisconsin under any type of consumer transaction.<sup>52</sup> Second, in addition to the universal provisions of the WCA, certain other provisions of the WCA will also apply to collection activity conducted in Wisconsin if the out-of-state transaction involved a Wisconsin resident.<sup>53</sup> Finally, even if the out-of-state consumer transaction did not involve a Wisconsin resident and the parties agreed on a foreign choice-of-law clause, if the foreign state’s laws conflict with certain provisions of the WCA, those foreign laws will not be effective when collection activity is conducted in Wisconsin.<sup>54</sup> This section analyzes each type of transaction.

#### 1. Universal Application

There are two parts of the WCA that will always apply when collection activity is conducted in Wisconsin. First, Chapter 427 (Debt Collection) “applies to any debt collection activity in [Wisconsin],

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48. *Id.* at \*2; *see also* Parent v. CitiBank (S.D.) N.A., No. 09-C-951, slip op. at \*3 (E.D. Wis. June 11, 2010) (noting that the WCA will not apply to a transaction unless it constitutes a consumer transaction, rather than a business transaction).

49. *Schalow*, 1988 WL 136048, at \*2.

50. *Id.*

51. *Id.*

52. WIS. STAT. § 421.201(4) (2011–2012) (“Chapter 427 applies to any debt collection activity in this state, including debt collection by means of mail or telephone communications directed to customers in this state.”); *see infra* text accompanying notes 58–79 (discussing section 421.201(5) of the Wisconsin Statutes).

53. *See* WIS. STAT. § 421.201(6); *see also infra* Part II.B.2.

54. *See* WIS. STAT. §§ 421.201(7)–(9)(a); *see also infra* Part II.B.3.



including . . . by means of mail or telephone” against customers in Wisconsin.<sup>55</sup> It is important to note that in order for Chapter 427 to apply to creditor collection activity, the debtor need only be a customer in Wisconsin and not a resident of Wisconsin.<sup>56</sup> A customer is simply one “who seeks or acquires real or personal property, services, money or credit for personal, family or household purposes.”<sup>57</sup>

Second, Subchapter I (Creditor’s Remedies) and Subchapter II (Enforcement of Security Interests in Collateral) of Chapter 425 apply to any proceeding “brought in [Wisconsin] to enforce rights arising from [a] consumer transaction[],” including repossession, and only require either that the customer be in Wisconsin or that the transaction involve an extortionate extension of credit.<sup>58</sup> Again, it is important to note that in order for Subchapters I and II of Chapter 425 to apply to creditor collection activity in Wisconsin, the debtor need only be a customer in Wisconsin and not a resident of Wisconsin.<sup>59</sup> For example, in *Walser Leasing, Inc. v. Simonson*,<sup>60</sup> Wisconsin residents<sup>61</sup> entered into a lease agreement with a Minnesota lessor that contained a Minnesota choice-of-law clause.<sup>62</sup> The Wisconsin residents subsequently defaulted under the lease agreement, and the Minnesota lessor repossessed the vehicles in Wisconsin in violation of the WCA.<sup>63</sup> The Minnesota lessor claimed that the lease agreement’s Minnesota choice-of-law provision precluded the application of the WCA to the repossession.<sup>64</sup> The court, however, rejected the lessor’s argument.<sup>65</sup> The court reasoned that when the Minnesota merchant sent its agents into Wisconsin, the creditor became

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55. WIS. STAT. § 421.201(4).

56. *See id.* (“Chapter 427 applies to any debt collection activity in this state . . . directed to customers in this state.”).

57. *Id.* § 421.301(17).

58. *Id.* §§ 421.201(5), 421.301(10); *see id.* § 425.108 (covering extortionate extensions of credit).

59. *See id.* § 421.201(5).

60. *Walser Leasing, Inc. v. Simonson*, 120 Wis. 2d 458, 355 N.W.2d 545 (Ct. App. 1984).

61. The Walsers’ residency was not relevant to their case because the prohibition against self-help repossession is contained in section 425.206 of the Wisconsin Statutes and is triggered by section 421.201(5). WIS. STAT. §§ 421.201(5), 425.206. Section 421.201(5) requires either that the customer be in Wisconsin or that the transaction involve an extortionate extension of credit. *See id.* § 421.201(5).

62. *See Walser*, 120 Wis. 2d at 460, 355 N.W.2d at 546.

63. *Id.*

64. *See id.* at 459, 355 N.W.2d at 545.

65. *Id.* at 460–61, 355 N.W.2d at 546.

subject to the WCA “just as they were subject to Wisconsin’s traffic laws” once in Wisconsin.<sup>66</sup>

Subchapter I and Subchapter II of Chapter 425 applies to in-state collection activity notwithstanding that the parties’ contract contains a foreign choice-of-law clause.<sup>67</sup> In *Credit Acceptance Corp. v. Kong*,<sup>68</sup> the debtors purchased a vehicle from a dealer in Minnesota with a down payment and financed the balance of the purchase price.<sup>69</sup> The contract had a choice-of-law provision specifying that Minnesota law would apply to the contract.<sup>70</sup> Upon default by the debtors, Credit Acceptance Corporation (CAC) repossessed the vehicle in Wisconsin through self-help.<sup>71</sup> Thereafter, CAC sought a deficiency judgment, and the debtors counterclaimed for WCA violations.<sup>72</sup> The central issue before the court was whether the WCA applied to the transaction.<sup>73</sup> The court noted that the transaction was not made in Wisconsin but that “certain portions of the WCA apply to actions or other proceedings ‘brought in this state to enforce rights arising from consumer transactions . . . wherever made.’”<sup>74</sup> CAC argued, however, that the parties’ choice-of-law provision applying Minnesota law should preclude application of the WCA.<sup>75</sup> Specifically, CAC argued that the WCA provides that a choice-of-law provision is only invalid when *all* the provisions of the WCA are in application,<sup>76</sup> and in this case, since only Subchapters I and II of Chapter 425 applied, the parties’ choice-of-law provision should control.<sup>77</sup> The court, however,

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66. *Id.* at 461, 355 N.W.2d at 546.

67. *See* WIS. STAT. § 421.201(10)(a) (2011–2012) (stating that terms of a writing purporting to apply the law of another state are invalid).

68. *Credit Acceptance Corp. v. Kong*, 2012 WI App 98, 344 Wis. 2d 259, 822 N.W.2d 506.

69. *Id.* ¶ 2.

70. *Id.* ¶ 3.

71. *See id.* ¶¶ 5–6; *see also* 2 JAY E. GRENIG & NATHAN A. FISHBACH, WISCONSIN PRACTICE SERIES: METHODS OF PRACTICE § 71.11 (5th ed.) (explaining that some states permit “self-help” repossession). Self-help repossession “allow[s] creditors to repossess collateral without legal process upon a default by the borrower/consumer and without entry of judgment by a court.” *Id.*

72. *Credit Acceptance Corp.*, 2012 WI App 98, ¶ 5, 344 Wis. 2d 259, 822 N.W.2d 506.

73. *Id.* ¶ 9.

74. *Id.* ¶¶ 10–11 (citing WIS. STAT. § 421.201(5) (2009–2010)).

75. *Id.* ¶ 15.

76. *See id.* (providing that a foreign choice-of-law clause is “invalid ‘with respect to consumer transactions . . . to which [WIS. STAT.] chs. 421 to 427 apply’” (alteration in original) (quoting WIS. STAT. § 421.201(10)(a))).

77. *See id.* ¶ 15.

disagreed and held that “[a]s long as some portion of the WCA is applicable, no choice-of-law provisions are effective.”<sup>78</sup> This Article questions the validity of the *Credit Acceptance Corp.* decision and proposes a different approach to invalidating choice-of-law provisions.<sup>79</sup>

## 2. Out-of-State Consumer Transactions with a Wisconsin Resident

In addition to the parts of the WCA that universally apply,<sup>80</sup> other provisions of the WCA provide additional protections to out-of-state consumer transactions and modifications made “with a customer who is a resident of [Wisconsin] when the transaction or modification is made.”<sup>81</sup> The prerequisite to applying the WCA to an out-of-state transaction is that the consumer is a Wisconsin resident at the time of contracting.<sup>82</sup> Residency is determined in different ways depending on the statute under consideration,<sup>83</sup> but under the WCA, the address given on the contract determines residency.<sup>84</sup> For instance, where a consumer signed a lease in California and listed her address as one in California, her subjective belief that she was a Wisconsin resident at the time of contracting did not persuade the court that she was a Wisconsin resident for WCA purposes.<sup>85</sup>

Once Wisconsin residency is determined, there are three additional areas of WCA protection. First, only those charges permitted by Chapter 422 are recoverable by the creditor or assignee.<sup>86</sup> Second, the “merchant may not enforce rights against the customer to the extent” prohibited by Subchapter IV (Limitations on Agreements and Practices) of Chapter 422.<sup>87</sup> Third, the “merchant may not enforce rights

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78. *Id.* (citing WIS. STAT. § 421.201(10)(a)).

79. *See infra* Part II.E.3.

80. *See supra* Part II.B.1.

81. WIS. STAT. § 421.201(6) (2011–2012).

82. *Id.*

83. *See, e.g.*, WIS. STAT. § 815.18(2)(r) (“‘Resident’ means an individual who intends to maintain his or her principal dwelling in this state.”).

84. For WCA purposes, any customer is a Wisconsin resident if “the address given by the customer as his or her residence in any writing signed by the customer in connection with the consumer transaction” is a Wisconsin address. WIS. STAT. § 421.201(8). The customer’s given address remains as the correct address “until the merchant knows or has reason to know of a new or different address.” *Id.*

85. *Wehrenberg v. Toyota Motor Credit Corp.*, No. 2001AP0985, 2002 WL 24417, ¶ 4 (Wis. Ct. App. Jan. 10, 2002).

86. WIS. STAT. § 421.201(6)(a).

87. *Id.* § 421.201(6)(b).

against the customer to the extent” prohibited by Chapter 423 (Consumer Approval Transactions and Other Consumer Rights).<sup>88</sup>

### 3. Out-of-State Consumer Transactions with Non-Residents

As a general rule, “a consumer transaction or modification . . . made in another state with a customer who [is] not a [Wisconsin] resident . . . when the consumer transaction or modification [is] made, is valid and enforceable in [Wisconsin] according to its terms to the extent” those terms are valid in the other state.<sup>89</sup> However, debt collection activity and any other proceeding brought in Wisconsin to enforce rights arising from such a consumer transaction, including repossession, must comply with certain parts of the WCA even though the transaction may not have been made in Wisconsin, or involve a Wisconsin resident, because those provisions apply universally in Wisconsin.<sup>90</sup> Thus, any conflict between the universally applicable provisions of the WCA and the parties’ contract terms (e.g., a clause authorizing self-help repossession) will be resolved in favor of the WCA.

#### *C. Collection Activity Outside of Wisconsin*

Generally, the WCA will not apply to an action or proceeding to recover “collateral or goods subject to a motor vehicle consumer lease” where the collateral or goods are located in another state.<sup>91</sup> Rather, the law of the state where the collateral is located will control.<sup>92</sup> There are, however, a couple of exceptions to this general rule.

First, albeit the collateral may be in another state, the WCA will apply where “the collateral or goods subject to a motor vehicle consumer lease are owned by a Wisconsin resident,<sup>93</sup> who has removed the collateral . . . from [Wisconsin]” to attend his employment, to use in his employment, or “for temporary periods which do not exceed 15 days.”<sup>94</sup> This exception is the employment/temporary removal

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88. *Id.*

89. *Id.* § 421.201(7).

90. *See supra* Part II.B.1.

91. WIS. STAT. § 421.201(5).

92. *Id.*

93. Residency under the WCA is determined by the customer’s address given on the contract, not the customer’s intent at the time of contracting. *See supra* notes 18–19 and accompanying text.

94. WIS. STAT. § 421.201(5).

exception.

Though there is sparse legislative history on the employment/temporary removal exception, a Wisconsin court has addressed the exception.<sup>95</sup> In *Patrin v. Chrysler Credit Corp.*, Wisconsin residents purchased a motor vehicle from a Minnesota car dealer on credit.<sup>96</sup> Subsequently, the debtors defaulted, and the vehicle was repossessed in Minnesota while the Wisconsin resident was at work in Minnesota.<sup>97</sup> The complaint did not indicate where the consumer credit transaction took place.<sup>98</sup> The court stated the issue to be “whether the limited extraterritorial extension contained in § 421.201(5) of the [WCA] [could] be applied to prohibit [self-help] repossession by out-of-state creditors of collateral owned by Wisconsin residents [in another state].”<sup>99</sup> Importantly, the court noted that if the WCA is “read without any restrictions, to apply extraterritorially to out-of-state merchants . . . serious due process [issues] could arise . . . .”<sup>100</sup> The court stated that it is clear that

Wisconsin has no constitutional authority to apply [the WCA] to a non-resident merchant or creditor having no contact with [Wisconsin] other than the fact that it consummated a transaction with a Wisconsin resident outside the state of Wisconsin and later repossessed the resident’s collateral while it was outside the state for use in the resident’s employment.<sup>101</sup>

Notably, the court left open whether Wisconsin can apply the WCA to “out-of-state merchants and creditors who enter into commercial transactions with Wisconsin residents outside of [Wisconsin], but who are registered to do business in Wisconsin . . . and who do undertake substantial business activity in Wisconsin.”<sup>102</sup> The court also did not answer the level of activity required to subject a merchant to the WCA’s extraterritorial extension under section 421.201(5).<sup>103</sup> However, the court indicated that the necessary showing required a more substantial

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95. *Patrin v. Chrysler Credit Corp.*, 530 F. Supp. 736, 738 (W.D. Wis. 1982).

96. *Id.* at 737.

97. *Id.*

98. *Id.*

99. *Id.* at 739.

100. *Id.* at 739–40.

101. *Id.* at 740.

102. *Id.*

103. *Id.*

connection than that required to establish minimum contacts for personal service.<sup>104</sup> In this case, the court concluded that the Wisconsin residents failed to plead enough facts to show a sufficient nexus between the Minnesota merchant and Wisconsin to warrant the application of Wisconsin's police power.<sup>105</sup>

Though the *Patrin* court did not address the level of activity required for Wisconsin's extraterritorial reach, the type of activity required to subject an interstate merchant, not registered to do business in a state, to the extraterritorial reach of a state's police power has been determined.<sup>106</sup> In *Aldens, Inc. v. Ryan*, Aldens challenged the constitutionality of Oklahoma's Uniform Consumer Credit Code.<sup>107</sup> The court noted that when determining the extraterritorial scope of state legislation a court must consider the "degree of contacts" between the state and the transaction to be regulated.<sup>108</sup> The contacts in *Ryan* included solicitations by Aldens in Oklahoma, goods shipped from Illinois to Oklahoma, and payments sent by Oklahoma residents to Illinois.<sup>109</sup> As a result, the court found "direct and continuing contacts" between Oklahoma and Aldens sufficient to justify Oklahoma's regulation of the contracts between Aldens and the Oklahoma residents it was doing business with.<sup>110</sup>

Second, if the parties' original agreement contained a choice-of-law provision indicating that Wisconsin law will control any dispute between the parties, Wisconsin law may apply to legal action in the other state. In *First Wisconsin National Bank of Madison v. Nicolaou*,<sup>111</sup> Wisconsin customers financed the purchase of an automobile from a Wisconsin merchant.<sup>112</sup> The contract between the parties provided that their

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104. *Id.*

105. *Id.*

106. *See Aldens, Inc. v. Ryan*, 454 F. Supp. 465, 472 (W.D. Okla. 1976) ("Where a contract affects the people of several States, each may have an interest which leaves it free to enforce its own contract policies." (citing *Watson v. Emp'rs Liab. Assurance Corp.*, 348 U.S. 66, 73 (1954))); *see also id.* (citing *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 180, 183 (1964) (holding that Florida had sufficient contacts with the transaction and the parties to apply its laws in accordance with constitutional requirements)).

107. *Aldens, Inc., v. Ryan*, 454 F. Supp. at 468–69.

108. *Id.* at 472.

109. *Id.* at 473.

110. *Id.*

111. *First Wis. Nat'l Bank of Madison v. Nicolaou*, 85 Wis. 2d 393, 270 N.W.2d 582 (Ct. App. 1978).

112. *Id.* at 395, 270 N.W.2d at 583.

agreement was “to be ‘governed by the *internal* laws of Wisconsin.’”<sup>113</sup> Thereafter, the customer moved to California without the merchant’s knowledge.<sup>114</sup> Upon default by the customer, the merchant repossessed and sold the vehicle in California for less than the amount of the outstanding debt.<sup>115</sup> The merchant accomplished the repossession through self-help, which was allowed under California law but not under the WCA.<sup>116</sup> When the merchant sought to recover the deficiency in Wisconsin,<sup>117</sup> the customer counterclaimed that the repossession violated the WCA.<sup>118</sup> The court had to decide whether Wisconsin or California law controlled the repossession that took place in California.<sup>119</sup> Generally, the WCA provides that the law of the state where the collateral is located governs out-of-state repossessions.<sup>120</sup> In this case, that would be California law. However, the court held that the extra-territorial language of section 421.201(5) of the WCA did not qualify as “internal law” of Wisconsin since it only operated outside of Wisconsin.<sup>121</sup> As a result, the court held that all the remaining provisions of the WCA were the “internal law” of Wisconsin and thereby governed the repossession in California.<sup>122</sup> Subsequently, one federal court in Wisconsin confirmed that if the parties’ contract in *Nicolaou* had not contained the Wisconsin choice-of-law clause, California law would have controlled the repossession.<sup>123</sup> Nevertheless, *Nicolaou* indicates that a consumer transaction between a Wisconsin resident and a Wisconsin merchant that contains a Wisconsin choice-of-law clause will

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113. *Id.* at 397, 270 N.W.2d at 584. “Internal laws” mean “the law [that] would govern [a] purely domestic Wisconsin [dispute].” *Id.* at 399, 270 N.W.2d at 585.

114. *Id.* at 395, 270 N.W.2d at 583.

115. *Id.*

116. *See id.* at 396, 270 N.W.2d at 584 (citing *Adams v. S. Cal. First Nat’l Bank*, 492 F.2d 324, 332 (9th Cir. 1973)) (explaining that self-help repossession is permissible under California law); *id.* at 397, 270 N.W.2d at 584 (citing and using the 1975–1976 version of section 425.206(1) of the Wisconsin Statutes, a previous version of the Wisconsin rule prohibiting self-help); *see also* WIS. STAT. § 425.206(1) (2011–2012).

117. *Nicolaou*, 85 Wis. 2d at 395, 270 N.W.2d at 583.

118. *Id.* at 394, 270 N.W.2d at 583.

119. *Id.* at 396, 270 N.W.2d at 584.

120. WIS. STAT. § 421.201(5).

121. *Nicolaou*, 85 Wis. 2d at 398, 270 N.W.2d at 585; *see also* WIS. STAT. § 421.201(5) (“[C]onduct, action or proceedings to recover collateral or goods subject to a motor vehicle consumer lease *shall be governed by the law of the state where the collateral or goods subject to a motor vehicle consumer lease are located at the time of recovery . . .*” (emphasis added)).

122. *Nicolaou*, 85 Wis. 2d at 399–400, 270 N.W.2d at 585–86.

123. *Patrin v. Chrysler Credit Corp.*, 530 F. Supp. 736, 739 (W.D. Wis. 1982).



apply the WCA to any legal action in a foreign jurisdiction.<sup>124</sup>

#### D. Open-End Credit Plans

Regarding open-end credit plans,<sup>125</sup> the WCA applies if the customer is a Wisconsin resident and one of the following occurs: (1) if “the open-end creditor or a merchant honoring a credit card issued by the open-end creditor, is a [Wisconsin] resident”; (2) if the merchant is not a Wisconsin resident, the merchant must have “furnishe[d], mail[ed] or deliver[ed] the goods, services or credit to a [Wisconsin] resident . . . while the customer [was] [in Wisconsin]”; or (3) if the merchant is not a Wisconsin resident, the merchant receives a writing proving the transaction that is signed by the Wisconsin resident in Wisconsin.<sup>126</sup> Ultimately, Wisconsin residency is the *sine qua non*<sup>127</sup> when applying the WCA to credit card sales to Wisconsin residents.<sup>128</sup> The WCA will also apply to any transaction if the customer is a Wisconsin resident and the parties agree that Wisconsin law applies to their transaction.<sup>129</sup>

Many credit card sales in Wisconsin involve an out-of-state merchant selling to a Wisconsin customer.<sup>130</sup> Unquestionably, compliance with the numerous requirements of the WCA is a burden on an interstate merchant. Is the burden, however, so heavy as to cause an unconstitutional interference with interstate commerce? *Aldens, Inc. v.*

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124. *Nicolaou*, 85 Wis. 2d at 399–400, 270 N.W.2d at 585–86. It should be noted that it is not best practice to use the term “internal law” when drafting a choice-of-law clause. See *supra* Part II.E.

125. An open-end credit plan as defined under Wisconsin law is the extension of credit to a consumer pursuant to a plan where: the creditor allows a customer “to make purchases . . . from time to time, directly from the creditor or indirectly by use of a credit card”; the customer can pay the balance “in full or in installments”; the creditor can impose a finance charge on an outstanding balance; and “[t]he creditor has treated the transaction as open-end consumer credit for purposes of any disclosures required under the federal consumer credit protection act.” WIS. STAT. § 421.301(27).

126. WIS. STAT. § 421.201(3).

127. BLACK’S LAW DICTIONARY 1511 (9th ed. 2009) (“An indispensable condition or thing; something on which something else necessarily depends.”).

128. See *Wehrenberg v. Toyota Motor Credit Corp.*, No. 2001AP0985, 2002 WL 24417 (Wis. Ct. App. Jan. 10, 2002) (explaining that residency under the WCA is determined by the address the customer put on the contract regardless of the customer’s subjective belief); *supra* notes 16–39 and accompanying text.

129. WIS. STAT. § 421.201(9)(b). For a discussion of *Nicolaou*, 85 Wis. 2d 393, 270 N.W.2d 582, where the parties’ contract had a Wisconsin choice-of-law clause, see Part II.C.

130. See, e.g., Part II.A. (discussing *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977)).



*LaFollette* raised that issue.<sup>131</sup> Aldens sold goods on credit to Wisconsin residents.<sup>132</sup> The company had its only physical place of business in Illinois.<sup>133</sup> Aldens brought a declaratory judgment action against the State of Wisconsin seeking a determination that the WCA was an undue burden on interstate commerce.<sup>134</sup> The court balanced the interests of Wisconsin in protecting its residents against the burden on interstate merchants of complying with the WCA<sup>135</sup> and concluded that the burden on interstate commerce was a tolerable one.<sup>136</sup>

### *E. Choice-of-Law*

#### 1. Wisconsin Choice-of-Law Clauses

The WCA will apply to a consumer transaction if the customer is a Wisconsin resident at the time of the transaction and the parties' choice-of-law provision provides Wisconsin law controls, no matter where the contract was made.<sup>137</sup> The WCA provides a very concrete definition for determining residency.<sup>138</sup> A party's subjective intent is often used as the standard for determining residency,<sup>139</sup> but was expressly rejected under the WCA.<sup>140</sup> Additionally, a Wisconsin choice-of-law provision is valid notwithstanding that it may also provide that the Federal Arbitration Act shall govern any arbitration between the parties.<sup>141</sup>

A Wisconsin choice-of-law provision will not only apply to litigation in Wisconsin but also to litigation in another state. In *First Wisconsin*

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131. *LaFollette*, 552 F.2d 745.

132. *Id.* at 748.

133. *Id.* at 747.

134. *Id.* at 746–47.

135. *Id.* at 752.

136. *Id.* at 753.

137. WIS. STAT. § 421.201(9)(b) (2011–2012).

138. *Id.* § 421.201(8) (“[T]he residence of a customer is the address given by the customer as his or her residence in any writing signed by the customer in connection with a consumer transaction.”); see *supra* notes 17–24 and accompanying text.

139. See WIS. STAT. § 815.18(2)(r) (“‘Resident’ means an individual who intends to maintain his or her principal dwelling in this state.”).

140. See *supra* Part II.A (discussing *Wehrenberg v. Toyota Motor Credit Corp.*, No. 2001AP0985, 2002 WL 24417 (Wis. Ct. App. Jan. 10, 2002)).

141. *Cottonwood Fin., Ltd. v. Estes*, 2012 WI App 12, ¶ 15, 339 Wis. 2d 472, 810 N.W.2d 852 (enforcing loan agreement with a choice-of-law clause). The loan agreement provided, “This Loan Agreement will be governed by the laws of the State of Wisconsin, except that the arbitration provision is governed by the Federal Arbitration Act (‘FAA’).” *Id.*

*National Bank of Madison v. Nicolaou*,<sup>142</sup> a Wisconsin consumer purchased an automobile on credit from a Wisconsin dealer.<sup>143</sup> Subsequently, the consumer moved the automobile to California without the creditor's consent.<sup>144</sup> Thereafter, the consumer defaulted on the required payments, and the creditor repossessed the vehicle in California without judicial process.<sup>145</sup> The repossession conformed to California law but violated the WCA.<sup>146</sup> After selling the vehicle, the creditor brought an action in Wisconsin to recover the deficiency.<sup>147</sup> The sole issue before the court was whether California or Wisconsin law governed the repossession of the vehicle in California.<sup>148</sup> The contract between the parties provided that "the agreement was to be 'governed by the *internal* laws of Wisconsin.'"<sup>149</sup> The court reasoned that the part of section 421.201(5) of the WCA that provides that "proceedings to recover collateral shall be governed by the law of the state where the collateral is located at the time of its recovery," operates outside of Wisconsin, and as such, it "does not qualify as [Wisconsin] 'internal law.'"<sup>150</sup> Consequently, the court held that section 421.201(5) was not applicable.<sup>151</sup> As a result, the court reasoned that the remaining provisions of the WCA (absent section 421.201(5)) were the internal law of Wisconsin and therefore applicable to the repossession in California.<sup>152</sup> Thus, the court held that a choice-of-law provision, which provided that Wisconsin law shall control, made Wisconsin internal law ("the law [that] would govern [a] purely domestic Wisconsin [dispute]")<sup>153</sup> applicable to any contract enforcement act wherever it

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142. First Wis. Nat'l Bank of Madison v. Nicolaou, 85 Wis. 2d 393, 270 N.W.2d 582 (Ct. App. 1978).

143. See *id.* at 395–96, 270 N.W.2d at 583–84 (deeming that the issue the court must resolve involved "repossession of [a] van which constituted the collateral under the consumer installment sale and security agreement").

144. *Id.* at 395, 270 N.W.2d at 583.

145. *Id.*

146. *Id.* at 396–97, 270 N.W.2d at 584.

147. *Id.* at 395, 270 N.W.2d at 583.

148. *Id.* at 396, 270 N.W.2d at 584.

149. *Id.* at 397, 270 N.W.2d at 584.

150. *Id.* at 398, 270 N.W.2d at 585 (citing WIS. STAT. § 421.201(5) (1975–1976)).

151. *Id.*

152. *Id.* at 399–400, 270 N.W.2d at 585–86.

153. See *id.* at 399, 270 N.W.2d at 585; see also BLACK'S LAW DICTIONARY 1023 (9th ed. 2009). Local law is defined as analogous to internal law: "The law of a particular jurisdiction, as opposed to the law of a foreign state. — Also termed *internal law*." *Id.*

might occur.<sup>154</sup> Absent the choice-of-law provision specifying Wisconsin law, California law would have controlled the repossession.<sup>155</sup>

Significantly, the court in *Nicolaou* stated that even if the contract would have provided that the “agreement [was] governed by the law of Wisconsin” and deleted the word “internal,” the court’s reasoning would have been the same.<sup>156</sup> However, that result may not necessarily follow. The concept of what constitutes the “internal law” of a state as discussed in *Nicolaou* is not a defined term. Yet, the term “local law” is a generally defined term, which is “the body of standards, principles and rules [of a state], exclusive of its [choice-of-law rules] . . . .”<sup>157</sup> By comparison, the term “law” is the state’s “local law” plus its choice-of-law rules.<sup>158</sup> Thus, best practice suggests that to avoid a future choice-of-law problem under the WCA, the choice-of-law clause should provide that “Wisconsin local law” will control, not “Wisconsin law.”

## 2. Foreign Choice-of-Law Clauses

If the customer is a resident of Wisconsin and the WCA applies to the consumer transaction, any foreign choice-of-law clause is invalid.<sup>159</sup> However, if a “customer is not a [Wisconsin] resident . . . at the time of a consumer transaction and the parties then agree that the law of his or her residence applies” to the transaction (choice-of-law), then the WCA does not apply.<sup>160</sup> Similarly,

a consumer transaction or modification . . . made in another state

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154. *Nicolaou*, 85 Wis. 2d at 399, 270 N.W.2d at 585.

155. *Patrin v. Chrysler Credit Corp.*, 530 F. Supp. 736, 739 (W.D. Wis. 1982) (“[*Nicolaou*] is very narrow and depends exclusively on the contractual choice-of-law provision. Absent that provision, [i.e., absent the agreement that Wisconsin “internal law” applies,] the plaintiff’s act of repossession would have been governed by the law of California.”).

156. *See Nicolaou*, 85 Wis. 2d at 398 & n.2, 270 N.W.2d at 585 & n.2.

157. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4 (1971) (“As used in the Restatement of this Subject, the ‘local law’ of a state is the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them.”); *see State Farm Life Ins. Co. v. Pyare Square Corp.*, 112 Wis. 2d 65, 69 n.2, 331 N.W.2d 656, 658 n.2 (Ct. App. 1983) (citing Restatement § 4 with approval).

158. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4 (1971) (“As used in the Restatement of this Subject, the ‘law’ of a state is that state’s local law, together with its rules of Conflict of Laws.”).

159. WIS. STAT § 421.201(10) (2011–2012); *see infra* Part II.E.3.

160. WIS. STAT. § 421.201(9)(a).

with a customer who [is] not a [Wisconsin] resident . . . when the . . . transaction or modification [is] made, is valid and enforceable in [Wisconsin] according to its terms to the extent that it is valid and enforceable [in the other state].<sup>161</sup>

There are, however, three exceptions where the foreign law will not be applicable.<sup>162</sup> First, Chapter 427 (Debt Collection) of the WCA will apply to any collection activity in Wisconsin.<sup>163</sup>

Second, Subchapter I (Creditor's Remedies) and Subchapter II (Enforcement of Security Interests in Collateral) of Chapter 425 (Remedies & Penalties) apply to any proceeding brought in Wisconsin to enforce rights arising from a consumer transaction, including repossession.<sup>164</sup> In *Walser Leasing, Inc. v. Simonson*,<sup>165</sup> Wisconsin residents<sup>166</sup> leased two cars from a Minnesota lessor.<sup>167</sup> Subsequently, the Wisconsin residents defaulted on their lease payments, and the Minnesota lessor repossessed the vehicles in Wisconsin without a court order or the debtor's consent, in violation of the WCA.<sup>168</sup> The Minnesota lessor claimed that the lease agreement's choice-of-law provision (applying Minnesota law) and the due process clause precluded the application of the WCA to the repossession.<sup>169</sup> The court rejected both of the lessor's arguments.<sup>170</sup> Instead, the court reasoned that when the creditor sent its agents into Wisconsin to repossess the vehicle, the creditor became subject to the WCA just as it became subject to Wisconsin's traffic laws.<sup>171</sup> Thus, the choice-of-law clause applying Minnesota law was of no effect.

Third, notwithstanding a foreign choice-of-law provision, the WCA

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161. *Id.* § 421.201(7).

162. *See id.* § 421.201(7), (9)(a).

163. *Id.* § 421.201(4) ("Chapter 427 applies to any debt collection activity in this state, including debt collection by means of mail or telephone communications directed to customers in this state.").

164. *Id.* § 421.201(5).

165. *Walser Leasing, Inc. v. Simonson*, 120 Wis. 2d 458, 355 N.W.2d 545 (Ct. App. 1984).

166. *See supra* note 61 and accompanying text (citing Wis. Stat. §§ 421.201(5), .206 and explaining that the Walsers' residency was actually irrelevant in this particular case).

167. *Walser*, 120 Wis. 2d at 460, 355 N.W.2d at 546.

168. *Id.*

169. *Id.* at 459, 355 N.W.2d at 545.

170. *See id.* at 459–60, 355 N.W.2d at 545–46 (affirming the lower courts judgment and thus rejecting both of Walser's contentions).

171. *See id.* at 460–61, 355 N.W.2d at 546.

will apply where “the collateral or goods subject to a motor vehicle consumer lease are owned by a Wisconsin resident, who has removed the collateral . . . from [Wisconsin]” to attend his employment, to use in his employment, or “for temporary periods [that] do not exceed 15 days.”<sup>172</sup>

This is the employment/temporary removal exception.<sup>173</sup> The courts have provided limited guidance on its use. In *Patrin v. Chrysler Credit Corp.*, Wisconsin residents purchased a motor vehicle on credit from a Minnesota car dealer.<sup>174</sup> Following the customer’s default, the merchant repossessed the vehicle in Minnesota while the Wisconsin resident was at work.<sup>175</sup> In subsequent litigation between the parties, the customer claimed the Minnesota self-help repossession violated the temporary removal exception of the WCA.<sup>176</sup> The primary issue before the court was whether the extra-territorial extension of section 421.201(5) of the WCA applies to an out-of-state repossession of collateral owned by a Wisconsin resident.<sup>177</sup> The court noted that “serious due process [issues] could arise” if section 421.201(5) applied to out-of-state merchants without any limitations.<sup>178</sup> As an initial matter, the court indicated that section 421.201(5) could not apply to an out-of-state merchant whose only contact with Wisconsin was the fact that the merchant entered into a contract outside of Wisconsin with a Wisconsin resident.<sup>179</sup> The court opined that for the employment/temporary removal exception to apply to a transaction, the customer must prove a more substantial connection between the merchant and Wisconsin than that required to establish minimum contacts for personal jurisdiction.<sup>180</sup> In the court’s opinion, the debtor’s evidence did not establish sufficient contacts to warrant application of the employment/temporary removal exception to the repossession.<sup>181</sup>

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172. WIS. STAT. § 421.201(5) (2011–2012).

173. *Patrin v. Chrysler Credit Corp.*, 530 F. Supp. 736, 739 (W.D. Wis. 1982).

174. *Id.* at 737.

175. *Id.*

176. *Id.*

177. *Id.* at 739–40.

178. *Id.* at 740.

179. *Id.*

180. *Id.*

181. *Id.*; see *supra* notes 106–10 and accompanying text (discussing contacts sufficient to extend the employment/temporary removal exception to an out-of-state merchant).

### 3. Nullification of Foreign Choice-of-Law Clauses

The WCA also provides that if Chapters 421 to 427 apply to a transaction, any choice-of-law provision that provides that the law of another state shall apply is invalid.<sup>182</sup> *Per Mar Security & Research Corp. v. Livesey* illustrates the choice-of-law nullification.<sup>183</sup> In *Per Mar*, a Wisconsin resident signed a contract for the installation of a home security system that included an annual fee for monitoring services.<sup>184</sup> The contract contained an Iowa choice-of-law clause.<sup>185</sup> When litigation ensued between the parties, the parties addressed the validity of the foreign choice-of-law clause.<sup>186</sup> It was clear that Chapters 421 to 427 applied to the transaction.<sup>187</sup> As a result, the court concluded that the foreign choice-of-law clause was not valid.<sup>188</sup>

The statutory condition precedent that nullifies a choice-of-law clause is that the transaction at issue is one “to which [Chapters] 421 to 427 apply.”<sup>189</sup> However, is the statutory condition precedent satisfied if only part of the WCA applies to the consumer transaction, or does it require that all of the Chapters of the WCA apply? Obviously, that determination will impact the scope of the nullification of a foreign choice-of-law provision. This issue was addressed in *Credit Acceptance Corp. v. Kong*.<sup>190</sup> In *Credit Acceptance Corp.*, the customer financed the purchase of a vehicle from a dealer in Minnesota.<sup>191</sup> The contract had a choice-of-law provision specifying that Minnesota law governed the

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182. See WIS. STAT. § 421.201(10)(a) (2011–2012) (stating that terms of a contract purporting to apply the law of another state are invalid); see also *Coady v. Cross Country Bank, Inc.*, 2007 WI App 26, ¶ 12, 299 Wis. 2d 420, 729 N.W.2d 732 (citing WIS. STAT. § 135.025(3) (2003–2004)) (comparing section 421.201(10)(a) to the provision of the Wisconsin Fair Dealership Law that expressly states that it cannot be circumvented by contract because both laws are meant to protect against unfair business practices by parties with superior bargaining power).

183. *Per Mar Sec. & Research Corp. v. Livesey*, No. 2006AP1351, 2007 WL 1041265 (Wis. Ct. App. Apr. 5, 2007). It should be noted, however, that choice-of-law was not an issue raised on appeal in this case. *Id.*

184. *Id.* ¶ 3.

185. *Id.* ¶ 9.

186. See *id.* ¶¶ 8–9.

187. *Id.* ¶ 8.

188. See *id.* ¶¶ 8–9.

189. WIS. STAT. § 421.201(10) (2011–2012).

190. *Credit Acceptance Corp. v. Kong*, 2012 WI App 98, 344 Wis. 2d 259, 822 N.W.2d 506.

191. *Id.* ¶ 2.

parties' rights.<sup>192</sup> When the customer defaulted, Credit Acceptance Corporation (CAC) used self-help to repossess the vehicle in Wisconsin.<sup>193</sup> After the repossession of the vehicle, CAC sought a judgment for the deficiency, and the debtors counterclaimed for damages due to WCA violations.<sup>194</sup> The primary issue in the case was whether the WCA applied to the transaction.<sup>195</sup> The court noted that even though the transaction was not made in Wisconsin, section 421.201(5) provides that "certain portions of the WCA apply to actions or other proceedings 'brought in [Wisconsin] to enforce rights arising from consumer transactions . . . wherever made.'"<sup>196</sup>

CAC asserted, however, that the contract's Minnesota choice-of-law provision precluded application of the WCA.<sup>197</sup> Specifically, CAC posited that a choice-of-law provision is only invalid under the WCA when *all* the provisions of the WCA are in application, and since only Subchapters I and II of Chapter 425 were in application in this case, the parties' choice-of-law provision should control.<sup>198</sup> The court, however, rejected CAC's arguments and held that "[a]s long as some portion of the WCA is applicable, no choice-of-law provisions are effective."<sup>199</sup> Thus, section 421.201(10) was applied to nullify the Minnesota choice-of-law clause in the parties' contract.

Upon review, it is apparent that the *Credit Acceptance Corp.* court reached the correct result with a questionable analysis. The opinion does not state whether the debtors were Wisconsin residents or not,<sup>200</sup> but that is not determinative of the outcome. It is clear, however, that the self-help repossession occurred in Wisconsin.<sup>201</sup> The issue briefed and decided by the court was whether the Minnesota choice-of-law clause should be nullified by section 421.201(10).<sup>202</sup> Unfortunately, that was not the correct issue in the case.

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192. *Id.* ¶ 3.

193. *Id.* ¶ 6.

194. *Id.* ¶¶ 5–6.

195. *Id.* ¶ 9.

196. *Id.* ¶ 11 (quoting WIS. STAT. § 421.201(5) (2009–2010)).

197. *Id.* ¶ 15.

198. *Id.* ¶ 15 (citing WIS. STAT. § 421.201(10)(a)) (noting "[t]he legislature's command that the WCA be liberally interpreted in favor of consumers").

199. *Id.* ¶ 15.

200. *See id.*

201. *Id.* ¶¶ 5–6.

202. *Id.* ¶ 9.



Section 421.201(4) provides that “any debt collection activity” in Wisconsin is subject to Chapter 427 of the WCA.<sup>203</sup> Wisconsin obviously has a significant interest in controlling debt collection activity within its borders. Similarly, section 421.201(5) provides that “Subchapters I and II of [Chapter] 425, relating to creditors remedies, . . . apply to [any] action[] or . . . proceeding[] brought in [Wisconsin] to enforce rights arising from consumer transactions . . . wherever made . . . .”<sup>204</sup> The mandate in section 421.201(5) applies to a consumer transaction made in another state with a non-resident.<sup>205</sup> In other words, once the merchant seeks to repossess in Wisconsin, the creditor must comply with section 421.201(5) even though Wisconsin’s only connection to the extra-territorial transaction is that the repossession occurs in Wisconsin.<sup>206</sup> Further, and more importantly, the mandate in section 421.201(5) applies to a consumer transaction where the customer is not a resident of Wisconsin at the time of the transaction, and the parties’ choice-of-law provision provides that another state’s law will control.<sup>207</sup> In other words, once the merchant seeks to repossess in Wisconsin, the creditor must comply with section 421.201(5) even though the parties’ choice-of-law provision provided that other law would control.<sup>208</sup> Both debt collection activity and repossessions are two areas where the paramount interest of the state in encouraging orderly conduct supersedes any private contract rights, including a choice-of-law clause. Once CAC sought to repossess in Wisconsin, it became subject to section 421.201(5). Thus, the correct issue in *Credit Acceptance Corp.* was whether CAC complied with Subchapters I and II of Chapter 425 when it repossessed the automobile. It is clear from the court’s discussion that CAC did not comply with a number of provisions contained in Subchapter I and II of Chapter 425.<sup>209</sup> Therefore, the outcome was correct, but the nullification analysis under section 421.201(10) was

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203. WIS. STAT. § 421.201(4) (2011–2012).

204. *Id.* § 421.201(5). Notably, Section 425.206 is part of Subchapter II and prohibits the self-help repossession that occurred in *Credit Acceptance Corp.*, 2012 WI App 98, 344 Wis. 2d 259, 822 N.W.2d 506. *Id.* § 425.206.

205. *Id.* § 421.201(5).

206. *Id.*

207. *Id.* § 421.201(9)(a) (2011–2012).

208. See *Credit Acceptance Corp. v. Kong*, 2012 WI App 98, ¶¶ 11, 15, 344 Wis. 2d 259, 822 N.W.2d 506 (finding that the Minnesota choice-of-law provision was inapplicable and that to bring suit in Wisconsin, the out-of-state creditor must still comply with WCA provisions).

209. See, e.g., *id.* ¶¶ 12–13 (noting that “Kong’s . . . retail installment contract is at odds with the applicable provisions of the WCA,” including the notice provision under § 425.104).



clearly a dictum, albeit disguised as the holding.

As noted in *Credit Acceptance Corp.*, section 421.201(10) provides that a foreign choice-of-law clause in a contract is invalid if Chapters 421 to 427 apply to the transaction.<sup>210</sup> The statutory issue raised by subsection 10 is whether the invalidation requires all or only a part of Chapters 421 to 427 to apply to the consumer transaction.<sup>211</sup> The *Credit Acceptance Corp.* court opined that as long as some portion of the WCA applies to the transaction, no choice-of-law provision is effective.<sup>212</sup> In other words, if only a part of the WCA applies to the transaction, invalidation of a foreign choice-of-law clause will result.<sup>213</sup> However, a literal application of this analysis absolutely destroys any foreign choice-of-law provision being used in Wisconsin. Specifically, Chapter 427 of the WCA applies to all debt collection activity in Wisconsin.<sup>214</sup> Further, “Subchapters I and II of [Chapter] 425, relating to creditors’ remedies, . . . apply to [all] actions or other proceedings brought in [Wisconsin] to enforce rights arising from consumer transactions,” such as repossession.<sup>215</sup> There are no exceptions to the application of these two parts of the WCA.<sup>216</sup> Debt collection activity in Wisconsin and any creditor seeking remedies in Wisconsin covers virtually 100% of creditor activity in Wisconsin. Thus, the analysis used by the court in *Credit Acceptance Corp.* essentially eliminates all foreign choice-of-law provisions.

A more reasonable approach suggests that invalidation should occur only when the full WCA, and not simply a part of the WCA, applies. When does the full WCA apply to a consumer transaction? The full WCA applies to a consumer transaction when that consumer transaction is “made in Wisconsin.”<sup>217</sup> Importantly, in addition to invalidating choice-of-law clauses, section 421.201(10) also invalidates any term in a

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210. *Id.* ¶ 15.

211. *Id.* (stating that creditor argued that all provisions of Chapter 421 to 427 must apply). The Court considered and rejected this argument, determining that “[a]s long as some portion of the WCA is applicable, no choice-of-law provisions are effective.” *Id.*

212. *Id.*

213. *See id.*

214. WIS. STAT. § 421.201(4) (2011–2012).

215. *Id.* § 421.201(5).

216. *See id.* § 421.202 (articulating exclusions to the WCA but not excluding debt collection activity or the type of creditors’ remedies found in Subchapters I and II of Chapter 425).

217. *See supra* Part II.A.

consumer transaction that indicates that the customer consents to the jurisdiction of another state<sup>218</sup> or any term that fixes venue.<sup>219</sup> In light of all three clauses that are invalidated by section 421.201(10), it seems reasonable to conclude that the legislature would want to protect Wisconsin residents who participated in a consumer transaction made in Wisconsin from a contract clause that provides any of the following: (a) that the law of another state shall apply; (b) that the customer consents to the jurisdiction of another state; or (c) that fixes venue. What is the result if invalidation occurs only when the consumer transaction is “made in Wisconsin”? Contracts with Wisconsin residents that are not made in Wisconsin, and contracts with non-residents who move to Wisconsin and become residents would be subject to: (1) compliance with Chapter 427 (Debt Collection),<sup>220</sup> (2) Subchapters I and II of Chapter 425,<sup>221</sup> or (3) the employment/temporary removal exception.<sup>222</sup> If a foreign choice-of-law clause falls outside one of those three enumerated circumstances, the clause should be honored in Wisconsin courts.

#### F. Venue

The WCA provides that if Chapters 421 to 427 apply to a transaction,<sup>223</sup> any term that fixes venue is invalid.<sup>224</sup> In addition, the WCA provides that if Chapters 421 to 427 apply to a transaction,<sup>225</sup> any term that indicates that the customer consents to the jurisdiction of another state is invalid.<sup>226</sup> Recall that there are different interpretations of the statutory language “if Chapters 421 to 427 applies to a transaction.”<sup>227</sup>

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218. WIS. STAT. § 421.201(10)(b).

219. *Id.* § 421.201(10)(c); *see also* Cottonwood Fin., LTD v. Estes, 2010 WI App 75, ¶ 19, 325 Wis. 2d 749, 784 N.W.2d 726 (finding the contract was unconscionable for various other reasons but noting that its plain violation of section 421.201(10)(c) by purporting to fix venue might add further support for the court’s conclusion that the arbitration clause is substantively unconscionable).

220. WIS. STAT. § 421.201(4); *see supra* notes 55–57 and accompanying text.

221. WIS. STAT. § 421.201(5); *see supra* notes 58–79 and accompanying text.

222. WIS. STAT. § 421.201(5); *see supra* notes 95–110 and accompanying text.

223. WIS. STAT. § 421.201(10).

224. *Id.* § 421.201(10)(c); *see supra* note 219 (discussing Cottonwood Fin., LTD v. Estes, 2010 WI App 75, ¶ 19, 325 Wis. 2d 749, 784 N.W.2d 726).

225. WIS. STAT. § 421.201(10).

226. *Id.* § 421.201(10)(b).

227. *See supra* Part II.E.3, for a discussion of this.

The WCA establishes venue for only two types of civil actions: consumer transactions and consumer credit transactions.<sup>228</sup> If the WCA applies to the transaction, the WCA venue rules will control.<sup>229</sup> In addition, if Chapters 421 to 427 apply to the transaction, the parties' contract cannot fix venue other than as the WCA provides.<sup>230</sup> On the other hand, if the transaction is not covered by the WCA, the general venue statutes<sup>231</sup> will apply to the transaction.<sup>232</sup> For the purposes of the WCA, "a claim arising out of a consumer transaction or a consumer credit transaction" can be brought in the county (1) "[w]here the customer resides"; (2) "[w]here the customer . . . is personally served"; (3) "[w]here the customer sought or acquired the property, services, money or credit [that] is the subject of the transaction"; (4) "[w]here the customer . . . signed the document" obligating him or her to the terms of the transaction; or (5) "[w]here [the] collateral securing a consumer credit transaction is located."<sup>233</sup> If venue is based on residence and there is more than one defendant, the claim can be brought in the county of any defendant.<sup>234</sup> Further, a provision in a contract that requires disputes to be resolved by arbitration and permits venue in locations other than those established by the WCA has been held substantively unconscionable.<sup>235</sup>

A failure to bring the action in the correct venue will cause the matter to be either transferred or dismissed.<sup>236</sup> An evidentiary hearing is generally required to make a final legal determination on venue.<sup>237</sup> There is no time limit for objecting to venue under the WCA, unlike

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228. WIS. STAT. § 421.401.

229. *Brunton v. Nuvel Credit Corp.*, 2010 WI 50, ¶ 20, 325 Wis. 2d 135, 785 N.W.2d 302.

230. WIS. STAT. § 421.201(10)(c).

231. *Id.* § 801.50–64.

232. *Ehle v. Detlor*, No. 1998AP0806, 1998 WL 541823, at \*4 (Wis. Ct. App. Aug. 27, 1998) (finding venue was not governed by section 421.401 because the transaction did not qualify as a "consumer transaction" under sections 421.301(13) or 421.301(17)).

233. WIS. STAT. § 421.401(1)(a)–(c).

234. *Id.* § 421.401(3).

235. See *supra* note 220 (citing *Cottonwood Fin., LTD v. Estes*, 2010 WI App 75, ¶¶ 21–23, 325 Wis. 2d 749, 784 N.W.2d 726, where a venue-fixing term in a contract contrary to section 421.201(10)(c) was evidence of substantive unconscionability).

236. See WIS. STAT. § 421.401(2)(a), (b).

237. *Condor Capital Corp. v. Lansing*, No. 2010AP1807, 2011 WL 2135687, ¶¶ 1, 7 (Wis. Ct. App. June 1, 2011) (reversing the lower court's denial of motion to vacate adverse judgment brought by debtor because the lower court did not hold an evidentiary hearing to determine whether venue was proper before denying the debtor's motion).

under the general venue statutes.<sup>238</sup> If a claim on a consumer transaction is brought in a particular county and it appears that county is not the proper place for the trial of the action, the court must transfer the action to the proper county, “unless the defendant appears and waives the improper venue.”<sup>239</sup> However, if the claim is based on a consumer credit transaction,<sup>240</sup> the court must dismiss the action for lack of jurisdiction.<sup>241</sup> Dismissal of an action for lack of jurisdiction entitles the moving party to attorney fees.<sup>242</sup> In addition, any judgment entered in a consumer credit transaction where venue was improper is void from the time of entry.<sup>243</sup> Conversely, if the WCA is not applicable, a defect in venue does not affect the validity of the judgment.<sup>244</sup> Also, a party’s failure to comply with the pleading requirements<sup>245</sup> of the WCA is not a jurisdictional defect that renders a judgment void.<sup>246</sup>

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238. *Brunton v. Nuvel Credit Corp.*, 2010 WI 50, ¶ 40, 325 Wis. 2d 135, 158–59, 785 N.W.2d 302, 313 (comparing the 2007–2008 version of section 421.401(2), which does not impose a time limit, with the general venue statute, Wis. STAT. § 801.51, which does, as support for the court’s interpretation that the WCA “places the onus on plaintiffs, typically creditors, to properly venue an action or risk dismissal when the defendant brings the improper venue to the circuit court’s attention”).

239. Wis. STAT. § 421.401(2)(a) (2011–2012); *Johnson v. Berge*, 2003 WI App 51, ¶¶ 7–8, 260 Wis. 2d 758, 659 N.W.2d 418 (citing *Kett v. Cmty. Credit Plan, Inc.*, 228 Wis. 2d 1, 16, 596 N.W.2d 786, 793 (1999)) (noting that defect in venue is not a jurisdictional matter except in actions relating to consumer credit transactions); *Johnson*, 2003 WI App 51, ¶ 9, 260 Wis. 3d 758, 659 N.W.2d 418 (citing *State ex rel. Hansen v. Circuit Court for Dane Cnty.*, 181 Wis. 2d 993, 1001–02, 513 N.W.2d 139, 143 (Ct. App. 1994)) (finding that the appropriate response when a defect in venue is not a jurisdictional matter is a “change of venue, not a motion to dismiss”).

240. See Anzivino, *supra* note 3, at 208.

241. Wis. STAT. § 421.401(2)(b).

242. *Cmty. Credit Plan, Inc. v. Johnson*, 228 Wis. 2d 30, 36–37, 596 N.W.2d 799, 802 (1999) (finding that award of attorney fees upon a violation of the WCA’s venue provision is consistent with the purpose of the WCA to “protect[] customers from the serious problems and inconveniences accompanying actions prosecuted in an improper venue”).

243. *Kett*, 228 Wis. 2d at 12–13, 596 N.W.2d at 792 (“[I]n general a defect in venue is not a jurisdictional defect affecting the validity of a judgment. Nevertheless, . . . this case falls within a legislatively crafted exception to the general venue provision. . . . [T]he defect in venue in these replevin actions arising from consumer credit transactions render[s] the Milwaukee County default replevin judgments invalid from the time of entry for purposes of Wis. STAT. § 425.206(1)(b).”).

244. Wis. STAT. § 801.50(1); *Radtke v. Levin*, No. 2001AP2616, 2002 WL 772750, at ¶¶ 3–9 (Wis. Ct. App. Apr. 30, 2002) (rejecting the debtor’s argument that the transaction was a consumer credit transaction and thus applying the general venue statute and leaving the judgment unaffected).

245. Wis. STAT. § 425.109 (3).

246. *Mercado v. GE Money Bank*, 2009 WI App 73, ¶ 22, 318 Wis. 2d 216, 229–30, 768

The requirements for a waiver of improper venue in a consumer transaction (not a consumer credit transaction) were delineated in *Brunton v. Nuvell Credit Corp.*<sup>247</sup> In *Brunton*, Brunton purchased an automobile on a seventy-two-month installment sale contract.<sup>248</sup> Two years after the purchase, Brunton defaulted on her payments.<sup>249</sup> Several months later, Brunton sued Nuvell in Dane County alleging various WCA violations.<sup>250</sup> Nuvell appeared in the action and filed an answer.<sup>251</sup> The parties litigated in Dane County for the next fourteen months.<sup>252</sup> While this litigation was ongoing, Nuvell commenced a replevin action in Rock County.<sup>253</sup> During the replevin action, Brunton's attorney "requested that Nuvell stipulate to transferring venue [from Dane County] to Rock County, rather than . . . dismissing the Dane County action and re-filing in Rock County."<sup>254</sup> Nuvell refused to stipulate and moved for summary judgment dismissing the action in Dane County.<sup>255</sup> Brunton argued that Nuvell had appeared and waived the improper Dane County venue.<sup>256</sup> More specifically, Brunton asserted that Nuvell waived the improper venue because Nuvell did not raise the improper venue at the outset of the litigation.<sup>257</sup> The court noted that the "proper venue [was] Rock County because that [was] where Brunton reside[d], where Brunton acquired the car, where the car [was] located and where Brunton signed the installment sale contract."<sup>258</sup> The court rejected Brunton's implied waiver argument.<sup>259</sup> Instead, the court noted that in order to waive improper venue, the statute requires that a party both appear and waive the improper venue, which are two distinctly different

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N.W.2d 53, 60 (finding that, unlike the venue provision of the WCA, section 425.109(3) does not demonstrate legislative intent to limit the court's jurisdiction).

247. *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶¶ 39–40, 325 Wis. 2d 135, 785 N.W.2d 302.

248. *Id.* ¶ 2.

249. *Id.* ¶ 3.

250. *Id.* ¶ 4.

251. *Id.*

252. *Id.*

253. *Id.* ¶¶ 3, 5.

254. *Id.* ¶ 5.

255. *Id.* ¶¶ 5–6.

256. *Id.* ¶ 6.

257. *Id.* ¶ 13.

258. *Id.* ¶ 24.

259. *Id.* ¶ 37.

acts.<sup>260</sup> The court reasoned that “[a] party ‘appears’ in an action either formally, by serving and filing a notice of appearance or an answer or by making a motion that serves to extend the time to answer, or informally, by actively litigating the merits of an issue without raising any jurisdictional objection.”<sup>261</sup>

The court indicated that three requirements must be met for a waiver: first, the party claiming the waiver must prove “that the defendant knew the place of proper venue”;<sup>262</sup> second, that the defendant “knew that he had the right to [dismiss] . . . the case when it was not properly venued”;<sup>263</sup> and third, that the party “intentionally relinquished” the improper venue.<sup>264</sup>

Further, the court noted that a waiver could occur either “by an express statement or by conduct.”<sup>265</sup> Waivers by express statement can occur “by filing a written stipulation with the court or by [an] oral stipulation made in open court and entered in the record . . . .”<sup>266</sup> Waiver by conduct occurs “by affirmative acts that unambiguously demonstrate that [the party] knows the place of proper venue, as well as the right to dismissal of the improperly venued action . . . , and that he nonetheless intends to relinquish such rights.”<sup>267</sup>

### III. CONCLUSION

In order for a transaction to be subject to the WCA, the transaction must be a consumer transaction or a consumer credit transaction and satisfy one of the territorial requirements mandated by the Act. A transaction “made in Wisconsin” will be subject to all the provisions of the WCA for any enforcement sought in Wisconsin. Certain sections of the WCA may also apply to enforcement in a foreign jurisdiction for transactions “made in Wisconsin” if the parties’ contract contains a Wisconsin choice-of-law clause. Any collection activity in Wisconsin will always trigger certain sections of the WCA. Whether the consumer

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260. *Id.* ¶ 28.

261. *Id.* ¶ 30 (quoting 4 AM. JUR. 2D § 1 (2007)).

262. *Id.* ¶ 37.

263. *Id.*

264. *Id.* ¶ 38 (citing *Fraser v. Aetna Life Ins. Co.*, 114 Wis. 510, 523–24, 90 N.W. 476, 481 (1902)).

265. *Id.* ¶ 38.

266. *Id.* ¶ 39.

267. *Id.*

was a Wisconsin resident or not at the time of the foreign transaction will determine the specific sections of the WCA that will be applicable to the Wisconsin collection activity. Any collection activity outside of Wisconsin is generally not subject to the WCA, and foreign law will govern. However, various sections of the WCA will apply to collection activity in a foreign jurisdiction if the transaction falls within the WCA's employment/temporary removal exception or the parties' contract contains a Wisconsin choice-of-law clause. There must, however, be a sufficient quantum of contacts between the out-of-state merchant and Wisconsin to satisfy Due Process and Commerce Clause requirements before the WCA can apply in the foreign jurisdiction. A foreign choice-of-law clause will have effect in Wisconsin courts under specified circumstances. However, the WCA has a nullification provision that may entirely nullify the foreign choice-of-law clause. Further, even though a foreign choice-of-law clause may be enforceable in Wisconsin, there are certain exceptions that will limit the scope of the foreign choice-of-law clause. And finally, the rules regarding venue under the WCA are significantly different than the rules under the general venue statutes.